(2015) 01 BOM CK 0045

In the Bombay High Court

Case No : Central Excise Appeal No. 2 of 2005

Commissioner of the Central Excise APPELLANT

Vs

Dev Ashish RESPONDENT

Date of Decision : 21-01-2015

Acts Referred:

Central Excises and Salt Act, 1944 — Section 11AC

Citation : (2015) 317 ELT 405 : (2015) 34 GSTR 513

Hon'ble Judges : S.P. Deshmukh, J.;S.C. Dharmadhikari, J.

Bench : Division Bench

Advocate : Pradeep S. Jetly and Jitendra B. Mishra, for the Appellant; V.V . Khemka, Advocates for the Respondent

Judgement

1. This Appeal challenges the order passed by the Customs, Excise and Service Tax Appellate Tribunal (CESTAT) dated 5th April, 2004 (Annexure-''G'').

2. This Appeal of the Revenue has been admitted by this Court on 20th October, 2005 on the following substantial question of law:-

"Whether on the facts of the case and in law, whether CESTAT was correct in law in deciding the appeal on the ground that section 11AB is prospective?"

3. We have heard Mr. Jetly appearing for the Revenue in support of this Appeal and Mr. Khemka appearing for the Respondent Assessee. The Respondent Assessee is engaged in the business of manufacturing of natural diamond powder and dust falling under Ch. H. No. 7101.80 of the Central Excise Tariff Act, 1985. The Assessee cleared these goods for sale without following the Central Excise Act, 1944 and Rules framed thereunder. The duty liability was not discharged. On investigation carried out by the Revenue/Department, it was revealed that the Assessee actually manufactured and cleared dutiable goods valued at Rs.4,04,32,816/-. A show cause notice was issued on 31st January, 2000 demanding duty of Rs.15,36,350/-. The proviso to section 11AC was invoked for imposition of penalty and for recovery of interest, section 11AB of the Central

Excise Act, 1944 was applied.

4. From the record, it reveals that the order passed by the Commissioner on the show cause notice dated 8th November, 2000 was accepted by the Assessee. The operative direction No. 2 in that order was that the Assessee shall pay interest on the confirmed demanded amount of Rs.15,36,350/- in terms of section 11AB of the Central Excise Act, 1944. A sum of Rs.10 lacs was deposited pending adjudication by the Assessee and the Commissioner directed that this was to be adjusted against the interest amount payable by the Assessee in terms of section 11AB of the Central Excise Act, 1944. The Assessee addressed a letter to the Deputy Commissioner of Central Excise dated 4th May, 2001 pointing out that a sum of Rs.10,62,682/-was paid on 20th October, 2000. That was ad-hoc payment and towards the interest. A sum of Rs.62,682/- was paid under protest. The year wise calculation of interest was furnished and the Assessee pointed out that no interest was leviable for the period prior to 28th September, 1996, as the Finance Bill of 1996 got assent of the President of India on 28th September, 1996. In such circumstances, the interest for the period prior to this date is erroneously paid and a refund should be granted in terms of the computation made by the Assessee.

5. On this communication from the Assessee, which was treated as the claim for refund, the Deputy Commissioner of Central Excise, (Division G-1), Mumbai passed an order on 22nd October, 2001 rejecting it. The conclusion recorded by him is that the show cause notice covers the period from February, 1995 to December, 1999. The Assessee has paid the entire amount of duty demanded along with interest, in installments. However, the Assessee requested that the interest prior to 28th September, 1996 has been erroneously collected. However, that assumption of the Assessee is incorrect because the provision enables imposition of interest in orders of adjudication made after 28th September, 1996. Therefore, the legal provision was rightly invoked. The claim for refund was rejected.

6. The Assessee carried the matter to the Appellate Authority, namely, the Commissioner of Central Excise (Appeals), Mumbai. The said Commissioner heard both sides and passed an order on 11th March, 2002. He held that the Assessee could not have claimed refund at all. The Assessee accepted the original order dated 8th November, 2000 confirming the duty demanded and recovering interest and imposing penalty. That having not been challenged, the claim for refund of interest for a period prior to 28th September, 1996 was untenable. The same was therefore rightly rejected by the Deputy Commissioner.

7. It was this order of the Commissioner (Appeals) which was challenged before the Tribunal. The Tribunal heard the Appeal and concluded that the issue is squarely covered by the Judgment of the Hon''ble Supreme Court in the case of Markandy Prasad Radhakrishna Prasad Pvt.Ltd. vs. Commissioner of Central Excise reported in 1998 (102) ELT 705ENDLAWFINDER The Judgment of the High Court of Jharkhand at Ranchi in the case of CCE Vs. Telco, and a Judgment of

the Hon''ble Supreme Court in the case of Commissioner of Central Excise vs. Elgi Equipment Ltd. reported in 2001 (128) ELT 52 cover the issue. Section 11AB and 11AC are prospective. Therefore, the Appellant is liable to pay interest only post 28th September, 1996. Holding thus, the Assessee''s Appeal came to be allowed by the Tribunal by the impugned order.

8. Mr. Jetly appearing for the Revenue in support of this Appeal submits that the Tribunal lost sight of the fact that the claim for interest itself was untenable. Section 11AB which was invoked by the Assessee did not permit a claim for refund of any interest simplicitor. In other words, no application seeking refund of interest amount paid, leaving out the duty component, was tenable. The words in section 11AB(1) "any person claiming refund of any duty of excise and interest, if any, paid on such duty" were substituted by Act 18 of 2008 w.e.f. 10th May, 2008. Therefore, the Assessee could not have filed any application for refund. The Assessee had not challenged the order-in-original dated 8th November, 2000 but accepted it. Hence, all the more the application made was untenable and should have been dismissed on this ground alone.

9. Mr. Khemka, on the other hand, would submit that the application for refund was scrutinised and the ground for rejecting it is not the one now canvassed before us. The Revenue never thought that the application was not maintainable or untenable. The ground now put forward was never raised during the course of the proceedings and right up to the Tribunal. Now it should not be open for the Revenue to urge that the claim for refund itself was not maintainable or incompetent. In the case of Commissioner of Central Excise vs. Northern Minerals Ltd. reported in 2007 (216) ELT 198 the Division Bench of the High Court of Punjab and Haryana has taken the same view. Even prior to the substitution by Act 18 of 2008, an application in the nature made by the Assessee was therefore maintainable. He brings to our notice the clear legal position, namely that section 11AB is now held to be prospective in operation. Once that is the legal position, then, the interest could not have been levied and recovered for the period prior to 28th September, 1996, as was urged before the Tribunal and the Deputy Commissioner and equally the Commissioner (Appeals). For all these reasons, he submits that the Appeal should be dismissed.

10. We have heard both sides extensively and, with their assistance, perused the memo of Appeal and the Annexures thereto. We are in agreement with Mr. Khemka that it is too late in the day for the Revenue to urge that the application was not maintainable. The application of the Assessee was to seek refund of a sum erroneously recovered as interest and for the period prior to 28th September, 1996. Since the demand was for a period from February, 1995 to December, 1999, till 28th September, 1996, no interest could have been levied on the unpaid duty amount. In these circumstances, the application for refund could not have been rejected only on the ground that it was not maintainable. The Revenue''s pleas before us are in the nature of afterthought. We do not think that any time this objection was raised by the Revenue. We are therefore of the

opinion that any larger question or controversy need not be gone into. Particularly, this Court has not admitted the Appeal on the question of law now raised by the Revenue. However, the Appeal has been admitted on the substantial question of law formulated on 20th October, 2005. The order was passed after noting the contentions of the Revenue and perusing the memo of Appeal. In these circumstances, by clarifying that the abovenoted question raised during the course of arguments can be examined in an appropriate case that we refuse to interfere with the order under challenge on this ground. The question of law that we have framed as substantial question of law has already been answered in series of decisions against the Revenue. The Tribunal has rightly placed reliance upon the language of section 11AB. It has also placed reliance upon coordinate Bench decision in the case of Markandy Prasad (supra). The Revenue has accepted the fact that the provision and as interpreted in the case of M/s. M. P. Tapes vs. Commissioner of Central Excise in CEGAT Order No. 1375 of 1997 dated 22nd April, 1997 lays down the correct law. The provisions of section 11AB, inserted w.e.f. 28th September, 1996 are in the nature of penal interest and would apply only to those cases where clearances were affected after 28th September, 1996, irrespective of the date of passing of the adjudication order. The above position is emanating from the arguments the Revenue and it binds it. In these circumstances, the question of law termed as substantial question of law by the Revenue and formulated by this Court cannot be answered in favour of the Revenue. The same will have to be answered against it and in favour of the Assessee.

11. As a result of the above discussion, we do not find any substance in the Appeal. It is accordingly dismissed, but without any order as to costs.

